

April 2007

## *Kelo* Compensation: The Future of Economic Development Takings

Benjamin A. Householder

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Benjamin A. Householder, *Kelo Compensation: The Future of Economic Development Takings*, 82 Chi.-Kent L. Rev. 1029 (2007).  
Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol82/iss2/26>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

## KELO COMPENSATION: THE FUTURE OF ECONOMIC DEVELOPMENT TAKINGS

BENJAMIN A. HOUSEHOLDER\*

[N]or shall private property be taken for a public use, without just compensation.

—Fifth Amendment, U.S. Constitution

### INTRODUCTION

The power of eminent domain can be described as a necessary evil, a tool that has been sustained for centuries based on the premise that the ends will justify the means. This principle has permeated takings jurisprudence,<sup>1</sup> and even the Constitution itself.<sup>2</sup> Therefore, on June 23, 2005, when the Supreme Court announced in *Kelo v. City of New London* that condemning private property for an economic purpose passes constitutional muster,<sup>3</sup> it was not a shock to the legal academy. Traditionally, the United States federal government and states have been able to use the power of eminent domain<sup>4</sup> for such “public use[s]” as building roads, schools, and railroads.<sup>5</sup> The *Kelo* decision, however, interprets “public use”<sup>6</sup> to mean “public purpose” and has thereby broadened, without much limitation, the scope of what may justify an exercise in eminent domain.<sup>7</sup> In other words, “[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-

\* J.D. Candidate, Chicago-Kent College of Law, 2007; B.A., Political Science, University of Wisconsin-Madison, 2004. I would like to thank Professor Daniel W. Hamilton for his advice and overall inspiration for this note, and Katie Vikingstad for her noteworthy patience and editorial contribution.

1. I will examine takings jurisprudence in great detail in later sections of this note.

2. U.S. CONST. amend. V.

3. *Kelo v. City of New London*, 545 U.S. 469, 488–90 (2005).

4. Eminent domain is the state power to appropriate property from a private owner for a public use or purpose. *See id.* at 472; *see also* U.S. CONST. amend. V.

5. *Kelo*, 545 U.S. at 477 (“[I]t is . . . clear that a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.”).

6. This is the specific language used in the Fifth Amendment. U.S. CONST. amend. V.

7. The *Kelo* holding expressly states what has been implied since 1954. *See* *Hous. Auth. v. Midkiff*, 467 U.S. 229, 233 (1984) (involving the redistribution of fee title for “public purpose”); *Berman v. Parker*, 348 U.S. 26, 32, 35 (1954) (involving the removal of blight for a “public purpose”).

Carlton, any home with a shopping mall, or any farm with a factory.”<sup>8</sup> Contrary to the legal academy, many private property owners were outraged by this holding.<sup>9</sup>

The Fifth Amendment to the United States Constitution expressly limits the state power of eminent domain by (1) requiring that the property be “taken for a public use” and (2) insuring that the condemnee receives “just compensation.”<sup>10</sup> The *Kelo* holding, however, has severely undermined the protection that is afforded by the Public Use Clause of the takings doctrine by interpreting “use” to effectively mean “purpose.”<sup>11</sup> Accordingly, the dissenters in *Kelo* went as far as to say the majority opinion stripped the Public Use Clause of all meaning,<sup>12</sup> thereby paving a smooth road for hungry developers to devise a “carefully considered” plan<sup>13</sup> to increase tax revenue, create jobs, and fatten their pockets. This frightens American private property owners because it jeopardizes their future ownership rights. The attitude can be described as reasonably selfish. But creating new job opportunities and increasing local tax revenue can, as this note will explain, be a very good thing, and the public benefits of such “carefully considered” development plans should not be ignored. Further, there is still one major bump on the road, which is the “just compensation” that must be paid to the condemnee whose property is taken.

Recently, the United States House of Representatives passed legislation, H.R. 4128, which proposes to deny federal funds to local municipalities using eminent domain to transfer property from one set of private owners to another.<sup>14</sup> However, the House legislation appears to completely ignore the public benefits of using eminent domain for economic develop-

8. *Kelo*, 545 U.S. at 503 (O’Conner, J., dissenting).

9. Adam Karlin, *A Backlash on Seizure of Property*, CHRISTIAN SCIENCE MONITOR, July 6, 2005, at 1 (“In the wake of the *Kelo* ruling, property-rights crusaders have responded through grassroots activism and elected officials. Bills and amendments that would limit use of eminent domain were generated in state legislatures and Congress within days of the Supreme Court decision.”); see *With Governor’s Signature Today, Alabama Will Become First State to Curb Eminent Domain Abuse After Kelo*, Aug. 3, 2005, INST. FOR JUST., [http://www.ij.org/private\\_property/castle/8\\_3\\_05pr.html](http://www.ij.org/private_property/castle/8_3_05pr.html) (last visited Jan. 8, 2007) (“Poll after poll shows Americans virtually united against eminent domain for private profit.”).

10. U.S. CONST. amend. V.

11. *Kelo*, 545 U.S. at 484 (deeming economic development a valid “public use” or “public purpose” under the Constitution).

12. *Id.* at 494 (O’Connor, J., dissenting) (“To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings ‘for public use’ is to wash out any distinction between private and public use of property—and thereby effectively to delete the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”); *id.* at 506 (Thomas, J., dissenting) (“If . . . ‘economic development’ takings are for a ‘public use,’ any taking is, and the Court has erased the Public Use Clause from our Constitution . . .”).

13. *Id.* at 478 (majority opinion).

14. H.R. 4128, 109th Cong. (2005).

ment, and instead focuses only on the negatives.<sup>15</sup> Supporters of the bill claimed that this legislation would “make local governments think twice about condemning privately owned houses and other non-blighted property so it can be transferred to private developers.”<sup>16</sup> Although this “think twice” objective is an appropriate end, the means are misguided. In *Kelo*, for example, the anticipated benefits of the Pfizer development project<sup>17</sup> were enormous.<sup>18</sup> The Pfizer Project was “expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs.”<sup>19</sup> Furthermore, the Pfizer Project was “expected to generate between \$680,544 and \$1,249,843 in [annual] property tax revenues” for New London.<sup>20</sup> Rather than praying for legislation that eliminates potential benefits for everybody,<sup>21</sup> the supporters of the bill should concentrate on creating a more balanced method of economic development takings that preserves the benefit to the community and at the same time prevents the condemnee from suffering a loss that is grossly disproportional to the surrounding gains.<sup>22</sup> One way to achieve this balance is by reinterpreting the Just Compensation Clause to take into account more than just the fair market value of the property taken.<sup>23</sup>

Because of *Kelo*, many United States citizens now see eminent domain as a serious threat to their property rights.<sup>24</sup> The notion that the prod-

15. See *id.* at 7–8.

16. Kenneth Harney, *On Capital Hill, a Move to Curb Eminent Domain*, WASH. POST, Nov. 5, 2005, at F1.

17. See *infra* text accompanying notes 141–48 for more details pertaining to the Pfizer Development Project.

18. See Brief of the Respondents at 8, No. 04-108, *Kelo v. City of New London*, 545 U.S. 469 (2005).

19. *Id.*

20. *Id.* (alteration in original).

21. See Terry Pristin, *Eminent Domain Revisited: A Minnesota Case*, N.Y. TIMES, Oct. 5, 2005, at C9 (providing an excellent example of a beneficial economic taking involving the condemnation of a single auto dealer for the construction of a \$160 million Best Buy corporate headquarters in a Minneapolis suburb of 34,000 people. “The 1.6-million-square-foot campus, made up of four buildings shaped like ships, was completed in 2003 and currently houses 4,500 employees. City officials say it has given a big boost to an aging community that had been steadily losing population since the 1970’s [sic.]”); see also *infra* text accompanying notes 162–67 (explained in detail).

22. The community gains through increased tax revenue and job opportunities, and the private developer gains through profit realized as a result of the taking. Therefore, some of this gain should be transferred to the innocent condemnee, who involuntarily sells his property for whatever price the market commands, good or bad.

23. See *Kelo*, 545 U.S. at 489 (“In affirming the City’s authority to take petitioners’ properties, we do not minimize the hardship that condemnations may entail, notwithstanding the payment of just compensation.”).

24. See *House Panel Wants to Block Funding for Eminent Domain Takings*, GREENWIRE, Sept. 8, 2005 (“The fear is now in the hearts of many Americans that if the government wants your property, they have the right to take it . . .” (quoting Representative Henry Bonilla) (internal quotations omitted)).

uct of one's sweat and determination can be taken away by the government is understandably bothersome to all private property owners.<sup>25</sup> Nevertheless, under circumstances similar to those seen in *Kelo*,<sup>26</sup> private property owners should accept that their rights will be sacrificed for the public good. Individual private owners do not have legal interests that are superior to those of the general public.<sup>27</sup> However unfair or unjust it may appear on the surface, all private property rights must yield to the public need.<sup>28</sup> Consequently, efforts to block the power of eminent domain go against the grain of our societal framework, because such legislation seeks to deprive the public of a tool that enables municipalities nationwide to determine what property uses are most beneficial for their respective communities as a whole. As a country, we need this power for future growth and development,<sup>29</sup> and legislation that seeks to destroy it fails to see the big picture, which is that we are only as strong as our weakest link. Therefore, the supporters of H.R. 4128 should redirect their efforts away from lobbying the government to cut funds for economic takings, and instead focus on determining the degree to which condemnees must be compensated for their loss,<sup>30</sup> because the general public interest in receiving benefits derived

25. The benefits of homeownership go beyond mere possession. See HomeSight, Benefits of Homeownership, <http://www.homesightwa.org/benefits%20of%20home%20ownership.htm> (last visited Jan. 8, 2007).

26. New London constitutionally exercised its eminent domain power to condemn fifteen homes for the Pfizer Project, which purports to advance the general public welfare of the city. In the future, developers will be able to cite *Kelo*, and municipalities will likely grant requests to exercise eminent domain. See also Iver Peterson, *As Land Goes to Revitalization, There Go the Old Neighbors*, N.Y. TIMES, Jan. 30, 2005, at 29 ("The courts, including the Supreme Court, have generally supported [the] argument that economic growth amounts to an overriding public benefit.").

27. The existence of the eminent domain power is a perfect illustration of how the general welfare trumps individual rights.

28. See U.S. CONST. amend. V (anticipating that private property will be taken for a "public use," and guaranteeing just compensation for such taking); see also *Kelo*, 545 U.S. at 484 (interpreting "public use" as "public purpose"); Timothy Egan, *Ruling Sets Off Tug of War Over Private Property*, N.Y. TIMES, July 30, 2005, at A1 ("The initial outcry after the court case was: Nobody's house is safe, we've got to do something now . . . [b]ut as more states take a look at this they will respond in some form, but they won't want to take away a valuable tool." (quoting Larry Morandi, who tracks land use developments for the National Conference of State Legislatures) (internal quotations omitted)).

29. See Ronald Smothers, *In Long Branch, No Olive Branches*, N.Y. TIMES, Oct. 16, 2005 William Dressel, executive director of New Jersey League of Municipalities, commented on the necessity of growth:

Given the fiscal condition of our state with its budget deficit and the absence of any lifeline whatsoever from the federal government, towns have been encouraged to work with the private sector ever since the redevelopment law in the state was passed in 1949 and amended in 1992 and 2003. . . . Where do people think development comes from? Some development fairy who waves her magic wand?

*Id.* (internal quotations omitted).

30. See Brief of American Planning Association, et al. as Amici Curiae in Support of Respondents, No. 04-108, *Kelo v. City of New London*, 545 U.S. 469 (2005) ("Adjusting compensation awards to provide more complete indemnification would be a far more effective reform of the existing system of eminent domain than increasing federal judicial review of public use determinations.").

from economic takings outweighs the private interest of property ownership.<sup>31</sup>

Any interpretation of just compensation has to be reconcilable with the express language itself. Where a taking furthers a purely public use, like a highway, it is “just” to give the condemned property owner the fair market value of the property, because the owner is also receiving the direct benefit of free access to a glorious highway. In that situation, the condemnee can actually see and participate in the end result of his sacrifice, and is not made to feel like a complete outsider who is chewed up and spit out by corporate America. On the other hand, where eminent domain is used to facilitate a quasi-public purpose, like a Best Buy that creates job opportunities and increased tax revenue, it is not necessarily “just” to simply give a property owner the fair market value of his property, prior to the taking, despite the wide variety of DVDs and Plasma televisions. Best Buy is a multi-billion-dollar enterprise that, just like Pfizer in *Kelo*, will surely realize huge profits from a new retail store. Therefore, because there is a considerable commercial benefit that will always be inextricably linked to economic takings, it is un-“just” that a condemnee is deprived of everything beyond fair market value.

This note calls for a new method of calculating “just compensation.” This new method, one that evaluates a multitude of factors in the determination of what is “just” compensation, will be referred to in this note as “*Kelo* compensation.” The notion of *Kelo* compensation encompasses the competing rights of the public and private parties in a condemnation proceeding and attempts to reach an economically just solution. It encompasses the idea that where there is a public purpose, and that purpose can only be furthered by transferring property from one set of private parties to another, then the transaction should not result in a gross economic disparity or, as Justice Black refers to it, a “manifest injustice.”<sup>32</sup>

*Kelo* is a perfect example of both. In 1990, the state of Connecticut designated New London as a “distressed municipality” after decades of

31. See *supra* text accompanying notes 19–20; see also Scot Wrighton, *Private Property Rights Still Safe*, ATLANTA JOURNAL—CONSTITUTION, Aug. 30, 2005, at 13A (“The popular outcry against *Kelo* overlooks that past abuses of eminent domain have generally been politically self-correcting. If the people of New London felt that the City Council had abused their authority they could petition for plan changes and/or replace the members of the City Council. They have done neither. The community supports the project because the public value to the entire city justifies acquiring *Kelo*’s land after she is fairly compensated, despite her individual relocation hardship.”).

32. In *United States v. Commodities Trading Corp.*, the Court used the concept of “manifest injustice” as the point in which it should stray from the typical measure of just compensation to counteract a blatant transactional bias in favor of either the condemnee or city/developer in an eminent domain proceeding. 339 U.S. 121, 123–24 (1950) (“The word ‘just’ in the Fifth Amendment evokes ideas of ‘fairness’ and ‘equity’ . . .”).

economic decline.<sup>33</sup> In 1996, the federal government shut down the Naval Undersea Warfare Center, located in Fort Trumbull,<sup>34</sup> which was an economically crucial aspect of New London.<sup>35</sup> After some legislative deliberation,<sup>36</sup> the city of New London determined that the Pfizer Project<sup>37</sup> would serve as a perfect launching point for the rejuvenation of the Fort Trumbull area.<sup>38</sup> The New London Development Corporation ("NLDC"), a private non-profit entity, was authorized by the city to execute the project.<sup>39</sup> The NLDC successfully negotiated the purchase of a significant portion of the required real estate, but as is usually the case in city development, there were some residents who simply refused to sell.<sup>40</sup>

One of those residents, petitioner Susette Kelo, a New London resident since 1997, made "extensive improvements to her house, which she prize[d] for its water view."<sup>41</sup> Further, Wilhelmina Dery, another petitioner, who was born in Fort Trumbull in 1918, and her husband Charles had lived in their home since they were married around sixty years ago.<sup>42</sup> The petitioners mentioned above, along with six others, all owned property that was subject to condemnation simply by virtue of its location in the future area of development.<sup>43</sup>

Therefore, the interested parties in *Kelo* were Pfizer, the nine condemnees, and all other local citizens that would reap the benefits of the Pfizer Project.<sup>44</sup> Pfizer stood to gain millions, if not billions, of dollars from this transaction, and the local non-condemnee residents would likely reap increased property values.<sup>45</sup> As for the nine unwilling condemnees,

33. *Kelo*, 545 U.S. at 473.

34. *Id.* Fort Trumbull was the specific area of New London involved in *Kelo*.

35. *Id.* The Naval Undersea Warfare Center employed over 1,500 people.

36. *Id.* The legislative deliberation involved a series of neighborhood meetings to educate the public about the process.

37. *Id.* The project consisted of the development of a \$300 million research facility for Pfizer Pharmaceuticals.

38. *Id.*

39. *Id.* at 473–75. The NLDC was authorized to purchase property through negotiation or to acquire property by exercising eminent domain in the city's name.

40. *Id.* at 475. In all, there were nine petitioners who owned fifteen properties in Fort Trumbull, New London.

41. *Id.*

42. *Id.*; see also Peterson, *supra* note 26 ("On a good day, Matt Dery can see Fishers Island, off the tip of Long Island, from his kitchen window here at the mouth of the Thames River. The view is one thing he loves about his home, and one reason he wants to stay.").

43. *Kelo*, 545 U.S. at 475. There was no evidence presented or any allegations that any of these properties were blighted or otherwise in poor condition.

44. *Id.*; see *infra* text accompanying notes 141–48. The benefits included tax revenues, increased employment, and inflated property values.

45. The development of the area would attract more citizens and business enterprises, which would have the effect of boosting the value of all of the surrounding land.

their situation was not as fortunate. Under current law, they were stuck with the fair market value of their property at the time of the taking as “just compensation.”<sup>46</sup> This is why private property owners have become enraged. *Kelo* has awoken the American public to this dilemma, and it has emphasized the need for balance under the takings doctrine.

The purpose of this note is to remind citizens of the United States that we cannot always have our cake and eat it too. We want to save the homeless, prevent crime, and cure disease with the minimal possible sacrifice. However, what may appear to be a minimal sacrifice to some is, in fact, something entirely different to others. In other words, it is easy to say eminent domain is a good tool when you are not the subject of the condemnation. On the other hand, the individual interests of the homeowner or condemnee rarely, if ever, outweigh the more general interests of an entire town or city. Before *Kelo*, the balancing of these interests was more straightforward. In a post-*Kelo* world, there needs to be a way to better serve all the involved parties’ interests. Consequently, under circumstances where a large private corporation is a primary beneficiary in an eminent domain proceeding designed with the “public purpose” of community improvement, fair market value alone is insufficient as just compensation to a condemnee, because it creates a grossly disproportional economic situation between all interested parties.

Part I of this note will discuss takings jurisprudence as it stands today, with a special emphasis on the link between the post-*Kelo* deterioration of the “public use” prong and a fresh interpretation of “just compensation.” Part II of this note will illustrate the unmistakable public benefits of economic takings, thereby calling into question legislation that seeks to block a state power that dates back to the inception of the Bill of Rights. Finally, Part III of this note will reveal the core issues involved with the innocent condemnee and will delve into possible solutions focusing on reinterpreting just compensation to account for factors beyond fair market value.

## I. TAKINGS JURISPRUDENCE

### A. *Public Purpose and the Deferential Standard*

The Fifth Amendment to the United States Constitution affords two primary protections to private property owners.<sup>47</sup> The first limitation on the

46. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950).

47. U.S. CONST. amend. V (stating “nor shall private property be taken for public use without just compensation.”).



eminent domain power is that it must be used to further a "public use."<sup>48</sup> Over the years, however, "public use" has morphed into "public purpose," and the protection afforded by the clause has lost its bite.

In 1954, in *Berman v. Parker*, the Supreme Court decided its first case involving a transfer from one private property owner to another through the use of eminent domain.<sup>49</sup> The District of Columbia was, at the time of *Berman*, not a very nice place to live.<sup>50</sup> Particularly, in southwest Washington, D.C.,<sup>51</sup> surveys prepared by the National Capital Planning Commission ("NCPC")<sup>52</sup> revealed that "64.3% of the dwellings were beyond repair, 18.4% needed major repairs, only 17.3% were satisfactory; 57.8% of the dwellings had outside toilets, 60.3% had no baths, 29.3% lacked electricity, 82.2% had no wash basins or laundry tubs, [and] 83.8% lacked central heating."<sup>53</sup> After a public hearing, the NCPC had its plan to redevelop the area certified for execution by the District of Columbia Redevelopment Land Agency.<sup>54</sup>

The "public purpose" justification in *Berman* was the removal of "blight," the hazards of which were painstakingly described by Justice Douglas.<sup>55</sup> The Court felt that a narrow interpretation of "public use" was simply incompatible with the evolving needs of society.<sup>56</sup> Further, the Court reasoned that determinations of circumstances requiring eminent domain was best left to state and local legislatures, and "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." Therefore, *Berman* stands for the proposition that the exercise of eminent domain is proper under circum-

48. *Id.*

49. 348 U.S. 26, 29 (1954) (involving a private developer who created a "comprehensive or general plan" designating land for use for "housing, business, industry, recreation, education, public buildings, public reservations, and other general categories of public and private uses of the land").

50. *Id.* at 28. Congress made a legislative determination that "owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare." *Id.*

51. *Id.* at 30. This area is referred to in the opinion as "Project Area B."

52. *Id.* at 29. The NCPC was authorized by Congress to adopt redevelopment plans for specific areas.

53. *Id.* at 30.

54. *Id.* at 30-31. The project creates "boundaries and allocates the use of the land for various purposes," including low-rent housing.

55. *Id.* at 32 ("Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed make living an almost insufferable burden . . . a blight on the community . . ." (emphasis added)).

56. *Id.* at 33 (stating, in dicta, that "[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary" (citation omitted)).

stances that can be justified by a legitimate, underlying “public purpose” as determined by local legislatures.<sup>57</sup>

Thirty years later, the Court upheld another “taking” using the deferential “public purpose” standard announced in *Berman*. In *Hawaii Housing Authority v. Midkiff*, the Court dealt with the issue of using the eminent domain power to redistribute fee simple ownership in land.<sup>58</sup> The Hawaiian Islands were originally settled around a feudal land tenure system that placed control of all the land in the hands of the high chief.<sup>59</sup> Beginning in the early 1800s, efforts were unsuccessfully made to divide the lands among the Crown, the chiefs, and the common people.<sup>60</sup> In the 1960s, the Hawaii Legislature was finally awoken to this issue and determined that while 49% of the state land was owned by Hawaii and the federal government, another 47% was held in fee simple by only seventy-two private landowners.<sup>61</sup> This led to the legislative conclusion that Hawaii’s concentrated land ownership scheme was having the harmful effect of skewing the state’s residential fee simple market, resulting in inflated land prices and causing injury to the “public tranquility and welfare.”<sup>62</sup>

To resolve the issue, the Hawaii Legislature designed a plan to condemn designated tracts of land from private fee simple owners and then resell that land to a set of private citizens who had applied for fee simple ownership.<sup>63</sup> The public purpose of the plan was to balance the residential land market, thereby reducing inflation and allowing more Hawaiians to experience the joys home ownership. In an 8–0 opinion,<sup>64</sup> the Court concluded that the social and economic “evils” associated with land oligopoly satisfied the “public use” requirement of the Fifth Amendment.<sup>65</sup> Further, the Court clearly supported the broad interpretation of “public use” set out in *Berman*, and stated in dictum, “The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose.”<sup>66</sup>

57. *Id.* at 32–33.

58. 467 U.S. 229, 231–32 (1984).

59. *Id.* at 232 (“There was no private ownership of land.”).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 233–34.

64. *Id.* at 245. Justice Marshall took no part in the consideration or decision of the case.

65. *Id.* at 241–42.

66. *Id.* at 243–44 (“It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.” (quoting *Rindge Co. v. L.A.*, 262 U.S. 700, 707 (1923) (internal quotations omitted))).

Therefore, *Midkiff* emphasizes that it is the “taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.”<sup>67</sup>

With *Berman* and *Midkiff* for ammunition, the majority in *Kelo* had no problem concluding, under the deferential standard of review, that boosting the economy was a legitimate “public purpose” for using the eminent domain power.<sup>68</sup> However, in an effort to preserve a limitation on the state’s power to appropriate property for a “public purpose,” the Court emphasized that “it has long been accepted that the sovereign may not take the property of *A* for the *sole purpose* of transferring it to another private party *B*, even though *A* is paid just compensation.”<sup>69</sup> This limitation is incredibly narrow and essentially provides that one-to-one transfers between private property owners cannot be facilitated by the eminent domain power.<sup>70</sup> Such a protection is merely illusory, however, because no local legislature would ever approve of a one-to-one transfer wholly unrelated to any public benefit whatsoever. Therefore, the *Kelo* holding has, in effect, eliminated the “public use” requirement of the takings doctrine by reasserting the *Midkiff* holding, concluding that if the taking bears a rational, legitimate relation to the public health, safety, and welfare, then there is nothing in the Fifth Amendment that would prohibit such an exercise of eminent domain.<sup>71</sup> Without any meaningful judicial review of what constitutes a “public use,” the clause can no longer function as a serious protection to private property owners.<sup>72</sup>

The Court in *Kelo* further bolstered its broad definition of “public purpose” and the wide latitude given to legislatures by acknowledging that a “government’s pursuit of a public purpose will often benefit individual private parties.”<sup>73</sup> This recognition of private benefit illustrates the Court’s unwillingness to strike down a legislative determination of “public use,” even where private citizens stand to greatly benefit from the taking. Accordingly, the current law is an extremely deferential approach, which essentially eliminates altogether judicial involvement in “public purpose”

67. *Id.* at 244. Justice O’Conner also makes it clear that “if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.” *Id.*

68. *Kelo v. City of New London*, 545 U.S. 469, 489–90 (2005).

69. *Id.* at 477 (emphasis added).

70. *Id.* at 487; see also *Midkiff*, 467 U.S. at 245 (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”).

71. *Midkiff*, 467 U.S. at 244 (“Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.”); see also *Kelo*, 545 U.S. at 494 (O’Conner, J., dissenting).

72. See *Kelo*, 545 U.S. at 488–89.

73. *Id.* at 485.

determinations, and therefore calls for a new approach to adjudicating a takings claim.<sup>74</sup>

### B. Just Compensation

In addition to the “public use” safeguard against illegitimate uses of eminent domain, the Fifth Amendment also requires that a condemnee be given “just compensation.”<sup>75</sup> For over a century, the Supreme Court has struggled to formulate a workable standard for determining just compensation:

In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value. The owner has been said to be entitled to the “value,” the “market value,” and the “fair market value” of what is taken. The term “fair” hardly adds anything to the phrase “market value,” which denotes what “it fairly may be believed that a purchaser in fair market conditions would have given,” or, more concisely, “market value fairly determined.”<sup>76</sup>

As is apparent from the above quote, “fair market value,” or as the Court in *United States v. Miller* put it, “market value fairly determined,” has been the historical jumping point for calculating just compensation in a condemnation case.<sup>77</sup> This section will examine what can only be described as the quagmire of defining what “fair market value” actually is, and will reveal the inescapable truth that there is, in fact, no settled standard at all.

In *Olson v. United States*, the Court interpreted the constitutional safeguard of just compensation to mean “no private property shall be appropriated to public uses unless a *full and exact equivalent* for it be returned to the owner.”<sup>78</sup> The Court ultimately reached the conclusion that the “exact equivalent” is the “market value of the property at the time of the taking contemporaneously paid in money.”<sup>79</sup>

74. *Id.* at 483 (“For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.”); *Berman v. Parker*, 348 U.S. 26, 32 (1954) (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . .”).

75. U.S. CONST. amend. V (stating “nor shall private property be taken for a public use without just compensation”).

76. *United States v. Miller*, 317 U.S. 369, 374 (1943) (footnotes omitted) (citing *United States v. New River Collieries Co.*, 262 U.S. 341, 344 (1923) (“market value”); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 81 (1913) (“fair market value”); *Bauman v. Ross*, 167 U.S. 548, 574 (1897) (“value”); *Boom Co. v. Patterson*, 98 U.S. 403, 408 (1878) (“market value”).

77. *See id.*

78. 292 U.S. 246, 254–55 (1934) (emphasis added) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893)).

79. *Id.* at 255 (citing *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 306 (1923)).

The petitioners in *Olson* were land owners with property along the Lake of the Woods, an area that lies in both the United States and Canada.<sup>80</sup> In 1898, a Canadian corporation<sup>81</sup> built and put into operation a dam for the purposes of generating power and other various public uses.<sup>82</sup> During its operation, many of the shorelands bordering the lake were flooded without any regard for the owners' rights.<sup>83</sup> In 1925, the United States consummated a treaty with Great Britain—who at the time controlled the relevant parts of Canada—which provided that the United States would be liable for the costs of obtaining flowage easements from the shoreland property owners injured by the dam.<sup>84</sup> Therefore, in 1926, in accordance with the treaty, the federal government sought to acquire, by purchase or condemnation, the necessary flowage easements.<sup>85</sup>

The petitioners, falling into the condemnee category, argued that because their property had been flooded, it demonstrated a special adaptability for reservoir purposes, thereby increasing its market value based on the private power company demand for producing electricity in the area.<sup>86</sup> The trial judge, however, excluded all evidence offered by the petitioners, and concluded that the appropriate compensation was to be the difference between the fair market value of the land before and after the easement was imposed.<sup>87</sup> The Supreme Court upheld the judgment of the trial court, but it stated in dictum that

to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account.

... [B]ut elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value ...<sup>88</sup>

The reluctance of the Court to award compensation based on the shorelands' potential use as a reservoir spawned from the remoteness of the notion that players in the power industry would actually be competing for

80. *Id.* at 248.

81. The corporation was acting pursuant to an agreement with Great Britain.

82. *Olson*, 292 U.S. at 249.

83. *Id.*

84. *Id.*

85. *Id.* at 250.

86. *Id.* at 251. The petitioners' property was condemned in 1929.

87. *Id.* at 253. The government would only be liable if the land value had decreased as a result of the flooding, and the jury was instructed to consider agricultural use or value as the sole criteria for determining market value. Additionally, no loss of value was to be attributed to the unauthorized flooding of the land prior to the treaty. *Id.* at 253–54.

88. *Id.* at 256–57.

these flowage rights had the government not planned to condemn them.<sup>89</sup> If there was any reasonable probability that the power companies would have, or legally could have, purchased the flowage rights prior to the condemnations, the Court would have likely ruled in favor of the petitioners. However, because no reasonable probability existed, the Court concluded that “the value to be ascertained does not include, and the owner is not entitled to compensation for any element resulting subsequently to or because of the taking.”<sup>90</sup>

In a similar case, the Court in *United States v. Miller* again put the fair market standard to the test.<sup>91</sup> In 1938, the United States government was faced with the task of creating a new right-of-way for the Central Pacific Railroad in anticipation of the inevitable flooding of the old right-of-way.<sup>92</sup> As a consequence, the federal government was forced to design a plan that involved condemning multiple privately owned properties to pave the way for the future railroad.<sup>93</sup> On December 14, 1938, the government filed a complaint in eminent domain against the respondents to condemn the land—consisting primarily of “uncleared brush land”—necessary for the railroad project.<sup>94</sup> However, in accordance with *Olson*, the trial court instructed the jury to award as compensation the fair market value of the property on August 26, 1937, the time at which the project was authorized by Congress.<sup>95</sup> The crucial point of dispute, however, was the additional instruction that the jury should “disregard increment of value *due to the initiation of the project* and arising after August 26, 1937.”<sup>96</sup>

The respondent condemnees in *Miller* agreed with the date of valuation, but argued that no element of determining market value should be discarded or ignored, including the anticipated value of their land based on the condemnation project itself.<sup>97</sup> The Court rejected this argument on the basis that such a rule would be overinclusive:

89. *Id.* at 260–61. The shoreland owners had no legal means of acquiring all the rights to flow the lands necessary for the raising of the lakes, and therefore, there was no probability of a private demand.

90. *Id.* at 256.

91. 317 U.S. 369, 370 (1943).

92. *Id.* at 370–71.

93. *Id.* at 371. The properties were located in a settlement known as Boomtown in northern California.

94. *Id.*

95. *Id.* at 372.

96. *Id.* at 372–73 (footnote omitted). The court of appeals reversed, but the Supreme Court, in a footnote to the *Miller* opinion, stated that the appellate court erred in characterizing the ruling of the trial judge, framing the instruction as “qualified witnesses testifying as to the value of the land on the date of the taking must subtract from this valuation *any increment in value* after August 26, 1937.” *Id.* at 373 & n.6.

97. *Id.* at 374. Other properties had already been condemned, thereby increasing the market value of the respondents’ property.

[S]trict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, *must in fairness* be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes.<sup>98</sup>

The Court in *Miller* ultimately agreed with the trial court instruction and held that where there is a public project designating specific tracts of land to be condemned or, as in the *Miller* facts, a plan that marked a more general area of prospective condemnation, none of the condemnees were entitled to an enhanced market value based on either (1) probable increases in value due to government activities, or (2) actual increases in value stemming from already completed portions of the government project.<sup>99</sup> The holding was based on a rule of foreseeability, stating simply that if there is a strong likelihood of condemnation, then no evidence as to enhanced value arising from the condemnation plan is admissible.<sup>100</sup> Because the respondents' land in *Miller* was within the general area of the future railroad, the Court held that they were not entitled to any enhanced value spawning from the construction of the new right-of-way.<sup>101</sup>

The *Miller* holding perfectly illustrates the Court's reluctance to apply a stringent standard of assessing "just compensation." The majority expressly stated, in dictum, that certain elements of market valuation,<sup>102</sup> although relevant to actual value, must for the sake of "fairness" be disregarded by the Court.<sup>103</sup> Therefore, the Court impliedly concluded that the application of a true market value standard would result in manifest injustice to the public.<sup>104</sup> If, for instance, the Court had allowed the respondents to benefit from either the anticipated increases in value or the prior takings where it was foreseeable that their property was inevitably going to be condemned as well, then this would have skewed the burden borne by the public to compensate the private owners for their loss, resulting in a windfall to the condemnee. This, of course, begs the question: What if the condemning party is not the government or the People? Additionally, what

98. *Id.* at 375 (emphasis added).

99. *Id.* at 376-77.

100. *Id.* at 377.

101. *Id.* at 379.

102. The elements discarded by the *Miller* majority are the owner's unwillingness to sell the property, or low supply, and the government's need to use the property, high demand—two elements that are absolutely key to determining market value in the traditional context.

103. *Miller*, 317 U.S. at 375.

104. See *id.*; see also *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950) ("[W]hen market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards." (emphasis added)).

if the condemnation is not for a public “use,” but rather, a public “purpose”?

One year after *Miller* was decided, the Court dealt with another case involving a government condemnation for a public “use” in *United States v. Commodities Trading Corp.*, and again acknowledged the flexibility of the fair market value standard.<sup>105</sup> In 1944,<sup>106</sup> the United States War Department requisitioned about 760,000 pounds of whole black pepper as a “necessit[y] of [the] wartime economy” from a private owner, Commodities Trading Corporation (“Commodities”), through the use of eminent domain.<sup>107</sup> It is important to note that Commodities was not a trader in pepper, but rather an investor in pepper, and at the time of condemnation it had held a stock of about 17,000,000 pounds of pepper in anticipation of a significant rise in the price, at which time it was expecting to sell it.<sup>108</sup> The government argued that just compensation should have been 6.63 cents per pound, the OPA ceiling price<sup>109</sup> of pepper at the time of condemnation.<sup>110</sup> Commodities claimed that they were entitled to 22 cents per pound, arguing, among other things, that Congress could not constitutionally fix the ceiling price as the measure for determining just compensation in a condemnation case.<sup>111</sup> In striking a compromise, the lower court came up with a fixed price of 15 cents per pound, using a multi-factor test to make its final determination.<sup>112</sup> This compromise and test, however, were ultimately reversed by the Supreme Court.<sup>113</sup>

105. 339 U.S. 121.

106. This case was decided during WWII.

107. *Commodities*, 339 U.S. at 122, 125.

108. *Commodities Trading Corp. v. United States (Commodities I)*, 83 F. Supp. 356, 357 (Ct. Cl. 1949).

109. The Office of Price Administration, a United States federal agency in World War II, was established to minimize wartime inflation. THE COLUMBIA ENCYCLOPEDIA (6th ed. 2005), available at <http://www.bartleby.com/65/of/OfficePr.html>. In order to achieve its goal, the OPA set ceiling prices on all commodities. *Id.*

110. *Commodities*, 339 U.S. at 122.

111. *Id.*

112. *Id.* at 122–23. The factors weighed by the lower court were (1) the “retention value” or price Commodities could have secured for its pepper had it been permitted to sell it after the government restrictions on pepper were lifted, (2) the original acquisition costs of Commodities for the pepper, (3) the prices at which Commodities sold pepper after the government condemnation, (4) subsequent OPA ceiling prices, and (5) the average price of pepper for the past seventy-five years. *Id.* at 123; see also *Commodities I*, 83 F. Supp. at 357 (stating that the first factor, “retention value,” referred to wartime conditions, where the government has the undisputed right to say to the citizen, “if you want to sell your property you must not sell it for more than a certain price,” but the government cannot condemn the property and then award this fixed price as just compensation unless that price reflects the condemnee’s right to hold his property until he can obtain the price a willing buyer would pay).

113. *Commodities*, 339 U.S. at 131.



The Court began its analysis with an overview of how just compensation is typically treated by the judiciary, stating that “when market value has been too difficult to find, or when its application would result in *manifest injustice to owner or public*, courts have fashioned and applied other standards.”<sup>114</sup> This dictum clearly supports the inference that the Court is willing to be flexible when it comes to calculating “just” compensation, and additionally lends credence to a theory that given the right set of circumstances—perhaps similar to those seen in *Kelo*—the Court may actually find a “manifest injustice” to the owner, rather than the public. This was not the case in *Commodities Trading*, however, because shortly after its brief overview, the Court concluded, in favor of the government and contrary to the lower court, that the OPA ceiling price at the time of the taking was sufficiently “just” compensation given the wartime conditions.<sup>115</sup> In reversing the lower court, the Supreme Court reasoned that because (1) OPA ceiling prices were fashioned with similar standards of “fairness” and “equity,” (2) commodities could only be sold at or below the ceiling prices, and (3) most businesses either dealing in perishable goods or dependent on continuous sales were forced to sell at the ceiling prices, those prices “represented not only market value but in fact the only value that could be realized by *most* owners.”<sup>116</sup> Additionally, the Court concluded that if “just” compensation awards were to generally exceed ceiling prices, entrepreneurial owners may see it as an opportunity to withhold essential wartime materials until condemnation, thereby frustrating the public objective that justified the taking in the first place.<sup>117</sup>

The Court, however, did provide an exception, placing the burden on *Commodities* to prove “special conditions and hardships peculiarly applicable to it” that could potentially adjust the award in its favor.<sup>118</sup> *Commodities*’ strongest arguments were (1) that the prices paid by *Commodities* to originally acquire the condemned pepper exceeded those of the ceiling price, and (2) its status as an “investor” in pepper, rather than a “trader,” entitled it to, as the lower court referred to it, “retention value” in the pepper.<sup>119</sup> The majority rejected both arguments. The first argument

114. *Id.* at 123 (emphasis added) (citing *United States v. Miller*, 317 U.S. 369 (1943); *Olson v. United States*, 292 U.S. 246 (1934)).

115. *Id.* at 125.

116. *Id.* at 124 (emphasis added). The Court also reasoned that many commodities were perishable and many businesses relied on continuous sales, thereby forcing many businesses to sell at the established OPA ceiling prices. This reasoning, despite the facts that pepper is not perishable and *Commodities* did not depend on continuous sales, applied in order to avoid an equal protection issue.

117. *Id.* at 125.

118. *Id.* at 128.

119. *Id.* at 128–29; see *supra* note 112 (explaining the term “retention value”).

was rejected on the grounds that the original price paid for the pepper was irrelevant, because economic losses or gains realized by the condemnee as a result of the taking are never factored into just compensation determinations.<sup>120</sup> The Court also concluded that *Commodities* had no right to “retention value,” pointing to numerous other businesses that lost anticipated profits as a result of price controls or condemnation,<sup>121</sup> and declared that “[s]acrifices of this kind and others far greater are the lot of a people engaged in war.”<sup>122</sup> The majority quickly acknowledged, however, that although wartime justified the losses, it did not legitimize imposing an “unfair and disproportionate burden” upon *Commodities*.<sup>123</sup> But in the next breath, the Court held that no such burden or “special conditions and hardships” were proven in this case.<sup>124</sup> The Court then rejected the remainder of *Commodities*’ arguments and reversed the lower court.<sup>125</sup>

To summarize, all three of the above cases involved a purely public “use,” the government always prevailed, and the Court was always hesitant about devising a universal just compensation standard that would apply to every condemnation. Additionally, there are two rules that can be extracted: (1) Fair market value or “market value fairly determined” is the value of the property at the time the taking is contemplated, or if contemporaneous with the taking itself, at the time the property is taken. (2) Condemnees are not entitled to any enhanced value attributable to the government project itself if there is, from the time of contemplation, a strong likelihood or probability that their property is going to be taken to further the project. The time of valuation rule is ironclad, but the enhanced value rule, if viewed in light of the *Commodities* holding, can be seen as a rule to avoid “manifest injustice” to the government or the People.<sup>126</sup> If,

120. *Olson v. United States*, 292 U.S. 246, 255 (1934) (“It may be more or less than the owner’s investment. He may have acquired the property for less than its worth or he may have paid a speculative and exorbitant price. Its value may have changed substantially while held by him. The return yielded may have been greater or less than interest, taxes and other carrying charges. The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner’s bargain.”).

121. Justice Jackson, in dissent, articulated stronger grounds for rejecting *Commodities*’ “retention value” argument. *Commodities*, 339 U.S. at 139–40 (Jackson, J., dissenting). The Emergency Price Control Act provided that “[n]othing in this Act shall be construed to require any person to sell any commodity.” *Id.* Therefore, according to Justice Jackson, the majority was confusing the separate issues of price fixing and condemnation, thereby applying the right of retention in a free market to a forced sale, where no such right ever exists. *Id.* at 140–41.

122. *Id.* at 129 (majority opinion).

123. *Id.*

124. *Id.*

125. *Id.* at 129–31.

126. *Id.* at 123. In the context of condemnation, the “government,” which at times feels like an entirely separate entity, morphs into the “People” given the public nature of the proceeding. This psyche carries over into the decisions of the Supreme Court. However, when you substitute a private corpora-

however, the primary beneficiary of the project is not the People, but rather a private corporation like Pfizer or Best Buy, such a rule may be interpreted to avoid “manifest injustice” to the owner condemnee. In other words, in a situation where a private corporation will profit from a condemnation—justified by collateral benefits to the local economy—the condemnee is suffering an “unfair and disproportionate” burden.<sup>127</sup>

*Olson*, in dictum, stated that elements affecting property value that are “reasonably probable” should be taken into the consideration of “just compensation.”<sup>128</sup> Using the *Kelo* facts as an illustration, Pfizer announced that it was going to build a \$300 million research facility in February 1998, but the New London city council did not authorize the NLDC to acquire property by eminent domain until January 2000, almost two full years later.<sup>129</sup> Therefore, with *Olson* and *Miller* as support, it can be argued that between the time Pfizer announced its new facility and the authorization of eminent domain,<sup>130</sup> it was “reasonably probable” that the demand for the condemnees’ property increased in anticipation of the Pfizer Project, thereby boosting its value. Consequently, those condemnees are theoretically entitled to the anticipation value of their property prior to contemplation of the taking.

Further, in dictum in *Miller*, the Court states that “strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, *must in fairness* be eliminated in a condemnation case.”<sup>131</sup> In *Miller*, those elements of value were the condemnees’ unwillingness to sell, or low supply, and the People’s need for a railroad, or high demand.<sup>132</sup> Those elements will always be present in a condemnation proceeding, but under circumstances where a corporation is the demanding entity, not the government, then perhaps those elements “must in fairness” be taken into account.

tion in place of the “People,” it has the immediate effect of lessening the public burden, thereby opening windows of opportunity for the condemnee.

127. *Id.* at 129.

128. *Olson v. United States*, 292 U.S. 246, 256–57 (“[T]o the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. . . . [but] elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value . . .”).

129. *Kelo v. City of New London*, 545 U.S. 469, 473–75 (2005).

130. *Miller* treated the time of contemplation as the time the treaty gave authority to the United States to use eminent domain. *United States v. Miller*, 317 U.S. 369, 372 (1943).

131. *Id.* at 375 (emphasis added).

132. *Id.*

*Commodities*, which can be described as indecisive at best, is the icing on the condemnee cake. After the Court rejected the multi-factor calculation scheme designed by the lower court, it reasoned that the OPA ceiling price, established by the government condemnor, was an appropriate “fair market” price to be paid as just compensation.<sup>133</sup> After reaching that conclusion, however, the Court appeared to second-guess itself by allowing *Commodities* to prove that it suffered an “unfair and disproportionate burden.”<sup>134</sup> Therefore, the Court expressed a willingness to look beyond fair market value, which it determined in *Commodities* to be the ceiling price, and take into consideration hardships of the condemnee.<sup>135</sup> Certainly, in a situation similar to *Kelo*, it can be said that the condemnee is suffering an “unfair and disproportionate burden” for the good of the community.<sup>136</sup> Why does the private corporation involved in the taking not share in this burden?

In the next section, I will illustrate the myriad benefits of economic takings, which will, consequently, stress the necessity of a more balanced method for determining just compensation in condemnation cases.

## II. SOCIOECONOMIC VALUE OF ECONOMIC TAKINGS

The power of eminent domain is a “vitaly important tool” for a growing and ever-changing society.<sup>137</sup> “Assembling land for redevelopment helps revitalize local economies, create much-needed jobs, and generate revenues that enable cities to provide essential services.”<sup>138</sup> Further, legislation that seeks to prevent all exercises in eminent domain that involve a transfer among private parties<sup>139</sup> has the possibility of hampering community development in an era of tremendous economic growth.<sup>140</sup>

133. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 128, 131 (1950).

134. *Id.* at 129.

135. *Id.* at 128.

136. *Cf. id.* at 128–29.

137. David J. Barron & Gerald E. Frug, *Make Eminent Domain Fair for All*, BOSTON GLOBE, Aug. 12, 2005, at A17.

138. See Int’l Econ. Dev. Council, Eminent Domain, [http://www.iedconline.org/?p=Eminent\\_Domain](http://www.iedconline.org/?p=Eminent_Domain) (last visited Sept. 6, 2006) (“essential services” refer to police, fire, school, water, etc.); see also Terry Pristin, *Connecticut Homeowners Say Eminent Domain Isn’t a Revenue-Raising Device*, N.Y. TIMES, Sept. 8, 2004, at C8 (“New London city authorities said the condemnations were justified because the city, one of Connecticut’s poorest, had endured three decades of economic decline, including the recent loss of 1,900 government jobs, and had few options for increasing its tax base to help pay for schools and services. After officials persuaded Pfizer, the drug company, to open a \$270 million research building on the site of a former linoleum plant, the adjacent Fort Trumbull neighborhood seemed ideally suited to attract additional investment . . .”).

139. H.R. 4128, 109th Cong. (2005).

140. See Int’l Econ. Dev. Council, *supra* note 138 (“[Anti-economic development] bills are job-killing pieces of legislation.”).

In *Kelo*, the projected benefits of the economic development project were far-reaching.<sup>141</sup> The “carefully considered” plan was anticipated to generate upwards of \$1 million in tax revenues, over a thousand jobs, and various improvements to the streets, sewers, and overall environmental conditions of the area.<sup>142</sup> In addition to the future potential benefits mentioned above, the first phase of the plan, which utilized the uncontested parcels, was actually completed in 2001.<sup>143</sup> The completed phase, highlighted by \$12 million of infrastructure for the Pfizer facility, was accompanied by “street improvements . . . new water, sewer and underground utility lines; new sidewalks and streetlights; and an extensive landscaping program with new tree plantings to screen out the upgraded regional wastewater treatment facility.”<sup>144</sup> The wastewater treatment facility, which was a major concern of the project, has already taken vast strides in reducing odors and improving aesthetic aspects of the surrounding landscape.<sup>145</sup> Additionally, a river walkway, which will be able to accommodate both pedestrian and bicycle traffic, is being constructed along the entire length of the area’s waterfront.<sup>146</sup> The final phases are currently underway, and they will include the construction of a conference center, hotel, and residential housing.<sup>147</sup> Although all of the benefits that motivated the plan are not guaranteed to accrue, the plan has already cleaned up the city in a variety of ways, and if they do come to fruition, it is undeniable that the City of New London will be drastically improved.<sup>148</sup>

There are multiple examples of economic takings that have proven to be beneficial to entire communities. In 2000, Canton, Mississippi, was chosen as the home for a new manufacturing plant of the Nissan Motor Company.<sup>149</sup> The State of Mississippi was inspired by a Mercedes-Benz factory that was built in neighboring Alabama, which had the effect of creating and facilitating, directly and indirectly, 83,000 jobs.<sup>150</sup> In November 2000, the Mississippi Development Authority (“MDA”) began acquiring approximately 1,400 needed acres for the 2.5 million square foot

141. See Brief of the Respondents, *supra* note 18, at 8.

142. *Id.*

143. See INT’L ECON. DEV. COUNCIL, EMINENT DOMAIN RESOURCE KIT 18, available at [http://www.iedonline.org/Downloads/Eminent\\_Domain\\_Kit.pdf](http://www.iedonline.org/Downloads/Eminent_Domain_Kit.pdf).

144. *Id.* at 18.

145. *Id.*

146. *Id.* at 18–19.

147. *Id.* at 19.

148. See *id.* at 16–19.

149. *Id.* at 20. Nissan promised over 4,000 jobs.

150. *Id.*

plant.<sup>151</sup> By August 2001, the MDA had successfully negotiated sales of the majority of needed parcels, and it was able to acquire the rest through the use of eminent domain.<sup>152</sup>

Production at the Nissan plant began on May 27, 2003, and “[s]ince then, Nissan has not only brought the promised jobs to Canton<sup>153</sup>; it has also invested in the community itself.”<sup>154</sup> Contributions from Nissan have included “\$100,000 to Boys and Girls Clubs, four full scholarships to area high school seniors, and a pledge of \$150,000 (over five years) to a consortium of Mississippi colleges.”<sup>155</sup> Further, it is estimated that by 2010, there will be a total of 31,683 direct and indirect jobs as a result of Nissan and personal income taxes, estimated to reach nearly \$700 million, will significantly contribute to the \$1.1 billion the state is expected to receive in revenues.<sup>156</sup>

Another example occurred in Topeka, Kansas, where the Target Corporation decided to locate its new distribution center.<sup>157</sup> GO Topeka, the economic development commission of the Topeka Chamber of Commerce, acquired nine of the twelve needed parcels of real property for the site, but there was private opposition to the sale of the remaining parcels.<sup>158</sup> GO Topeka ultimately prevailed in the Supreme Court of Kansas over two unwilling private property owners and condemned the remaining parcels using the eminent domain power.<sup>159</sup> Target signed a fifteen-year agreement promising to employ at least 650 people for ten years,<sup>160</sup> and in June 2004, the Target center opened and hired 600 employees with the expectation of adding 400 more within 3 years.<sup>161</sup>

Additionally, the eminent domain power was used in Richfield, Minnesota, a suburb of Minneapolis, to acquire land for the creation of a Best Buy headquarters.<sup>162</sup> Best Buy began acquiring property in 2001, a process

151. *Id.*

152. *Id.* at 21.

153. *Id.* Nissan promised over 4,000 jobs, and it ended up directly creating 5,300 jobs.

154. *Id.*

155. *Id.* Additionally, in 2005, Nissan made a payment in lieu of taxes of approximately \$1.5 million to the Canton School District.

156. *Id.*

157. *Id.* at 23.

158. *Id.*

159. *Id.* at 24.

160. *Id.*

161. *Id.* at 25.

162. *Id.* at 26; *see also* Pristin, *supra* note 21 (“Though there was loud opposition to the project from employees of the holdout property owner, Walser Auto Sales, and others who feared its effect on traffic, much of the community supported it. After a campaign in which redevelopment was a central issue, the mayor, Martin Kirsch, was re-elected in 2002 by a wide margin.”).

that was “facilitated by the fact that many residents felt the neighborhood had been deteriorating because homeowners had been unwilling to make repairs in the face of proposed development.”<sup>163</sup> However, as is typically the case, there was private opposition to the Best Buy headquarters.<sup>164</sup> After court-ordered mediation, Best Buy agreed to pay one private objector \$8.7 million in addition to the compensation given at the time of the initial taking, and Best Buy then officially relocated to the planned site on March 31, 2003.<sup>165</sup> Prior to the Best Buy project, the development area generated about \$700,000 in annual property taxes.<sup>166</sup> In 2005, only two years after Best Buy relocated, the property tax revenue more than quadrupled, reaching approximately \$3.2 million.<sup>167</sup>

Eminent domain was also used to completely restructure the commercial and social center of the city of Lakewood, Colorado.<sup>168</sup> In 1966, the Villa Italia Mall was constructed, and for thirty years it prevailed as the largest indoor shopping mall between Chicago and the west coast, offering 1.4 million square feet of commercial space.<sup>169</sup> However, in the early 1990s, the mall took a turn for the worst.<sup>170</sup> Between the years of 1994 and 2000, revenues dropped roughly \$1.2 million.<sup>171</sup> By 2001, its anchor department stores, J.C. Penney and Montgomery Ward, closed down.<sup>172</sup>

The city of Lakewood decided to take action, and throughout the course of a year, it underwent an in-depth public process, involving all interested parties within the community in its decision to revitalize the area.<sup>173</sup> Through this process, and the aid of a private development firm,<sup>174</sup>

163. INT’L ECON. DEV. COUNCIL, *supra* note 143, at 26–27.

164. *Id.* at 27. Walser Automotive Group owned two car dealerships totaling seven acres of the needed parcels, and it refused to sell. *See generally* Hous. & Redevelopment Auth. v. Walser Auto Sales, Inc., 630 N.W.2d 662 (Minn. Ct. App. 2001). After court-ordered mediation, Best Buy agreed to pay Walser an additional \$8.7 million on top of the \$9.45 million paid upon the initial taking, thereby bolstering my theory that *Kelo* compensation is a very plausible option in the context of economic development takings.

165. INT’L ECON. DEV. COUNCIL, *supra* note 143, at 27; *see also* Pristin, *supra* note 21 (“Some of the displaced homeowners, including Michael and Cindy Triggs, who said they received \$24,000 above their house’s market value, agreed that the redevelopment was in the best interests of Richfield. They said it also benefited the metropolitan area by moving thousands of employees from scattered suburban offices to a more central location within reach of bus transportation.”).

166. INT’L ECON. DEV. COUNCIL, *supra* note 143, at 27.

167. *Id.* at 26–27. This was nearly a twenty-two percent increase.

168. *Id.* at 28.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* The public process included “establishing a citizens advisory committee and inviting members of the community to comment on potential redevelopment options.”

174. *Id.* The firm was Denver-based Continuum Partners, LLC.

the city was able to ascertain a sense of what the community desired. It ultimately settled on a town center, Belmar, "covering 22 city blocks, comprising 175 stores (45 to start), 1,300 residential units, a 16-screen cineplex, a grocery store, 900,000 square feet of Class A office space, nine acres of open space, and 9,000 parking spaces (free garage and surface)."<sup>175</sup> The estimated cost of development was \$750 million.<sup>176</sup>

Continuum Partners, the private development company employed by the city to reconstruct the area, began to acquire land, which necessarily entailed the exercise of eminent domain.<sup>177</sup> The primary challenge to development came from a single business, Foley's, which objected because its rent was going to increase to support the new development.<sup>178</sup> After nine months of failed negotiations and litigation in court, the city and Continuum eventually prevailed.<sup>179</sup>

The first phase of development, comprised of "two parking garages, 600,000 square feet of retail, 200,000 square feet of office space, 154 row houses, and 100 apartments" was complete in May 2004.<sup>180</sup> The remaining development is expected to open sometime in 2007.<sup>181</sup>

Aesthetically pleasing building facades, designed to "enliven the street," were composed of brick, pre-cast concrete, glass, and steel.<sup>182</sup> Additionally, the entire city center is environmentally friendly, which is exemplified by its use of seventy percent recycled materials from the original site, and an "urban wind farm" powered lighting system in one of the parking lots.<sup>183</sup> In the continuing phases of development, a 2.1-acre urban-square park and a 1.1-acre plaza with a pond/winter skating rink will be constructed.<sup>184</sup> The Belmar development has really brought the entire community together, and it will continue to function "as the premier urban destination for the Denver Metro west side."<sup>185</sup>

Further, economic takings have been used to benefit a plethora of inner-city distressed communities.<sup>186</sup> City Heights, an "ethnically diverse community," was in the early 1990s considered the "most blighted and

175. *Id.*

176. *Id.*

177. *Id.* at 29.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *See id.* at 30.



distressed neighborhood in San Diego.”<sup>187</sup> Moreover, there was only one single supermarket providing groceries for the entire community, consisting of approximately 80,000 “low-to-moderate income residents.”<sup>188</sup> In 2001, the City Heights Urban Retail Village (“URV”) was developed to serve the “overall retail needs of the community” and, specifically, “to address residents’ desire for better grocery options.”<sup>189</sup> Again, eminent domain was necessary to acquire enough land to satisfy the demands of the project.<sup>190</sup> Upon the opening of the URV, the 110,000-square-foot shopping center<sup>191</sup> contained a 67,000-square-foot full-service supermarket, neighboring service retail stores,<sup>192</sup> and various convenience retail stores.<sup>193</sup> In addition, the URV provided over 200 full- and part-time jobs and has encouraged new development in the surrounding area.<sup>194</sup>

As the above examples illustrate, the power of eminent domain is crucial to struggling economies nationwide, and stripping local municipalities of this power can be equivocated with taking away thousands of jobs. So why has Congress even considered this proposal? Aside from the constitutional guarantees provided by the Fifth Amendment to “life, liberty, and property,” human nature affixes a very special meaning to “property.” John Locke’s comments on the “state of nature” still ring true today:

Thus the grass my horse has bit; the turfs my servant has cut; and the ore I have digged in any place, where I have a right to them in common with others, become my property, without the assignation or consent of anybody. The labour that was mine, removing them out of that common state they were in, hath fixed my property in them.<sup>195</sup>

Where the power of eminent domain is used, there will always be opposition from private property owners, and with good reason. The homeowners in *Kelo* spent many years making their property in New London their home; the business owner in the Colorado example was legitimately concerned about the future of his department stores; and the car salesman in Minnesota did not want to lose his dealerships.<sup>196</sup> Almost every person

187. *Id.*

188. *Id.* The supermarket was only 25,000 square feet.

189. *Id.*

190. *Id.*

191. *Id.* The shopping center was “nearly 100% leased.”

192. *Id.* These included Blockbuster, a health care facility, and Washington Mutual.

193. *Id.* These included a nail salon, McDonald’s, and Subway.

194. *Id.* at 30–31 (“[A]fter the project opened, a privately sponsored mixed-use project including 385,000 square feet of housing and office space was launched at a site across the street from the center.”).

195. JOHN LOCKE, *Second Treatise of Civil Government*, in 5 THE WORKS OF JOHN LOCKE: TWO TREATISES OF GOVERNMENT 105, 117 (1823).

196. INT’L ECON. DEV. COUNCIL, *supra* notes 143.

owns something, be it a house or a pair of lucky socks, and it is therefore easy to empathize with the condemnees in the above example. However, if giving up that pair of lucky socks would somehow help to cure the ills of society, such as poverty and unemployment, then surely the socks must be surrendered. But what is fair compensation for a pair of lucky socks?

### III. KELO COMPENSATION

#### A. *Unjust Compensation*

Despite the proven benefits of economic takings, there still remains the issue of resolving how much compensation is “just” as required by the Fifth Amendment. There is an inherent flaw in a system that simply awards fair market value to a property owner who is forced to give up property at the hand of the government—especially when the People are only collateral beneficiaries—and that flaw has become one of the major landowner concerns nationwide.<sup>197</sup>

The primary counterargument to awarding an amount that exceeds fair market value is simple: the government cannot afford it.<sup>198</sup> But big money private corporations, like Pfizer, can afford to foot the bill.<sup>199</sup> For example, in 2005, Pfizer posted a net income of \$2.73 billion, which was just below its 2004 level of \$2.83 billion.<sup>200</sup> With private corporations putting up these incredibly high profit margins, it is inexcusable that private condemnees receive none of the benefit when eminent domain is the tool used by these corporations to acquire their property. After all, but for the condemnation, these big development companies or corporations would be literally stopped in their tracks. In an article written by Elizabeth Anderson, a philosophy professor at the University of Michigan, she advances a theory of

197. See Bob Lewis, Letters from Readers, *Multiplied Value*, ST. LOUIS POST-DISPATCH, Nov. 24, 2005, at C22 (“The editorial ‘Good Riddance’ (Nov. 18) defines an appropriate range for the use of eminent domain. We must be very careful not to throw out the baby with the bath water when there are severe blight questions. Let me suggest an added stipulation: The Fifth Amendment requires ‘just compensation’ in taking property, usually interpreted as fair market value. Why not define just compensation as some multiple of fair market value in private redevelopment situations—such as three or four times. That would help assure that eminent domain is used only when absolutely necessary.”).

198. See Sean Connolly, Op-Ed., *A Public Purpose and a Public Benefit*, BOSTON GLOBE, July 10, 2005, at E12 (“Anytime there is a physical taking of private property for public use (with extraordinary exceptions for war, natural disasters, etc.), fair market value must be given to the property owner by the government. Governments simply do not have the money to injudiciously exercise their powers of eminent domain.”).

199. See *Pfizer Comes out Ahead by Beating Low Expectations*, CHI. TRIB., Jan. 20, 2006, at 4 (stating that Pfizer is the world’s largest drug maker).

200. *Id.*

just compensation reform, which will be expanded upon below.<sup>201</sup> Professor Anderson's theory is predicated upon the notion that the economic development project will succeed, thereby raising property values in the community.<sup>202</sup>

Professor Anderson's theory proposes that a private property owner should receive the greater of (a) the fair market value of the property plus any additional, reasonable moving costs, or (b) the fair market value of similarly situated property in the community subsequent to the implementation of the economic development plan.<sup>203</sup> Under this theory, she balances the benefit of increased property value of surrounding neighbors whose property was not condemned and insures that condemnees are able to enjoy an equivalent benefit.<sup>204</sup> Option (b), therefore, would give condemnees the ability to purchase property located in a nearby area, thereby alleviating many of the intangible concerns associated with a sense of "community." Additionally, option (a) gives insurance to the condemnee if the project fails, so they will not come out as "net economic losers" as a result of the taking.<sup>205</sup> Using the *Kelo* facts as an illustration, option (b) would allow the petitioner condemnees to receive the projected fair market value of similarly situated homes after completion of the Pfizer Project, as opposed to giving them the fair market value of the home before the project has commenced, which is the law as it stands.<sup>206</sup> This option would certainly lighten the financial blow to the Kelos, while at the same time allowing them to remain in New London.<sup>207</sup> Under the current law, it is likely that the Kelos will have to relocate to an entirely different location, a place they may never be able to call home.

### B. *Balancing the Private Right and Public Need*

Just compensation jurisprudence has always sought to balance the private right and the public need.<sup>208</sup> Under current law, developers are given an upper hand in bargaining with potential condemnees; either sell for mar-

201. See Elizabeth Anderson, *On Kelo: Barking up the Wrong Tree*, LEFT2RIGHT, Jan. 14, 2006, [http://left2right.typepad.com/main/2006/01/on\\_kelo\\_barking.html](http://left2right.typepad.com/main/2006/01/on_kelo_barking.html) (last visited Jan. 8, 2007) ("It is evident that the current rule of compensation, which supposedly offers property owners 'fair market value' for their property, is a cruel joke, leaving those whose property is taken net losers.").

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. See *United States v. Miller*, 317 U.S. 369 (1943); *Olson v. United States*, 292 U.S. 246 (1934).

207. This theory can be applied to all future condemnees where there is an economic taking.

208. See Barron & Frug, *supra* note 137.

ket value prior to the taking or be forced to sell through eminent domain proceedings.<sup>209</sup> This is “manifest injustice.”<sup>210</sup> The counterargument to a bright line enhanced market value standard is the clever seller who waits until condemnation proceedings to insure a better deal. Either way, an unwilling seller is entitled to an enhanced value,<sup>211</sup> an amount that takes into account all factors present at the time of the taking, including but not limited to, factors associated with a sense of “home,” the amount of private corporate benefit involved, and the potential value of the property as a result of the taking.<sup>212</sup> As an amicus brief in favor of the City of New London in *Kelo* conceded, the current standard occasionally fails to provide an adequate amount of compensation to owners whose property is taken through eminent domain.<sup>213</sup> Further, the brief continued to express that the “most obvious shortfall is the subjective value that individual owners attach to their properties.”<sup>214</sup> The brief articulates a variety of sources that contribute to subjective value of property, including improvements to the property specifically tailored to the needs and preferences of the property owner, friendships and other relationships they have formed in the community, and the general sense of security that flows from living in familiar surroundings.<sup>215</sup> The brief specifically admits that “[t]hese values are ignored under the fair market value test.”<sup>216</sup> Moreover, the brief details additional, consequential damages caused by the condemnation, including reasonable moving expenses, attorneys’ fees, loss or damage to personal property, and in the case of a business, the loss of goodwill.<sup>217</sup> These additional expenses are excluded from the current just compensation formula as well.<sup>218</sup> Taken in the aggregate, the brief makes the argument that these “systematic short-

209. This is what happened in *Kelo* and many other cases. Private developers will first seek to purchase needed property at market price from an owner, but often they fail. Then, the developers will approach the city and propose a “carefully considered” plan justifying the use of eminent domain. Upon approval, the property is “taken” and “just compensation” of fair market value is awarded to the owner.

210. See *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123. Justice Black articulated “manifest injustice” as reason for deviating from the fair market value standard.

211. See, e.g., Marc Ferris, *A Heated Dispute in Newark*, N.Y. TIMES, Sept. 5, 2004. John Inglesino, a lawyer who represents developers, supports increased compensation: “We will offer existing businesses compensation above and beyond what the law requires. . . . We want them to be part of the project and welcome the opportunity to incorporate them into our plan as long as it makes sense.” *Id.* (internal quotations omitted).

212. See Brief of the American Planning Association et al., *supra* note 30, at 27.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

falls in compensation help account for the intensity of opposition many homeowners express even to compensated takings.”<sup>219</sup>

In *United States v. Miller*, Justice Roberts articulated the unusual character of eminent domain.<sup>220</sup> He explained that in a typical situation, fair market value is “what a willing buyer would pay in cash to a willing seller.”<sup>221</sup> Justice Roberts then went on to describe the awkward situation created by a condemnation proceeding: a forced property exchange between an unwilling seller and a committed buyer.<sup>222</sup> The Court acknowledged that ascertaining “fair” market value under these circumstances “involves, at best, a guess by informed persons.”<sup>223</sup> Despite this backward bargain, the Court concluded that the difficulty of assessing property value in light of the circumstances presented must preclude factors such as unwillingness and need from the just compensation determination.<sup>224</sup>

The decision to preclude such factors in *Miller* was made under circumstances where the property was being condemned solely for the benefit of the “public.” The factors that were discarded by the *Miller* majority, unwillingness and need, should be revitalized in the wake of *Kelo* where there is an economic taking. The seller is just as unwilling, but the project no longer results solely in a “public” benefit; the economic opportunity created for the non-government condemnor demands an alternative interpretation of “just compensation.”

In light of the substantial profits that will be earned by a private company or corporation<sup>225</sup> involved in the taking, market value alone is no longer sufficient. The courts should consider multiple factors, including but not limited to fair market value, in their determinations of just compensation for an involuntary loss of property.

First, courts or state legislatures must address the bargaining problem for the condemnee that will inevitably arise in a situation where a private corporation acquirer is given a fall-back remedy of invoking eminent domain powers to acquire property. A study conducted by the Missouri Eminent Domain Task Force (“Task Force”) concluded in its recommendations that private buyers should be required to negotiate in good faith prior to the

219. *Id.* at 28.

220. *See* 317 U.S. 369, 375 (1943).

221. *Id.* at 374.

222. *Id.* at 375.

223. *Id.*

224. *Id.*

225. *Kelo v. City of New London*, 545 U.S. 469, 473 (2005). Pfizer is the acquiring corporation.

entry of an order for condemnation.<sup>226</sup> Suggested factors of determining whether such good faith negotiations have occurred include, but are not limited to (1) proper and timely notice to the landowner that condemnation proceedings may occur in the future; (2) an initial offer not lower than the fair market value of the property, determined by a certified appraiser; (3) an opportunity for the landowner to obtain an appraisal from a certified appraiser of his or her choice at the condemning authority's reasonable expense; and (4) an offer of mediation from the condemning authority to the landowner prior to condemnation.<sup>227</sup> Requiring these initial good faith negotiations will likely result in better deals for the landowner, creating a situation where eminent domain may not even be necessary, saving the municipality time and money. Further, the Task Force recommended that a final offer be submitted to the landowner, in writing, as well as with a reasonable amount of time for review of the offer prior to condemnation proceedings.<sup>228</sup> Moreover, a corollary to the good faith requirement should be the ability of courts to have discretion to penalize a condemning authority if bad faith is shown.<sup>229</sup> This penalty would assure that landowners take seriously the negotiations prior to condemnation, thereby acting to balance out discrepancies in bargaining power.

Second, the determination of fair market value should not be limited to the price a willing seller would sell to a willing buyer prior to the taking.<sup>230</sup> But rather, in an economic taking context, the determination of fair market value should also take into account future private corporation profits that will accrue from the condemnation.<sup>231</sup> In Fort Trumbull, for example, property values are surely going to increase as a result of the new construction,<sup>232</sup> and the victims of eminent domain are entitled to some of that benefit. After all, neighbors in the area who were not forced to give up their homes are surely going to profit from the transaction, so the condemnees should profit as well.

Third, additional factors that contribute to making the owner "whole" as a result of the taking should be considered as well. Thomas A. Merrill, a professor at Columbia Law School, suggested two methods of compensa-

226. MO. EMINENT DOMAIN TASK FORCE, FINAL REPORT AND RECOMMENDATIONS 12 (2005), available at <http://www.mo.gov/mo/eminentdomain/finalrpt.pdf>.

227. *Id.*

228. *Id.* at 13 (suggesting thirty days as a reasonable time prior to condemnation).

229. *Id.* at 18. This penalty could take the form of additional costs, such as reasonable attorney fees, expenses, or punitive damages.

230. This is the typical way of determining fair market value.

231. MO. EMINENT DOMAIN TASK FORCE, *supra* note 226, at 16.

232. See *supra* text accompanying notes 141–48.

tion reform in his testimony before the United States Senate Committee on the Judiciary.<sup>233</sup> Professor Merrill's first compensation strategy is based on the tort theory of indemnification, which seeks "to provide more complete recovery of losses, analogous to allowing recovery for pain and suffering in addition to out of pocket losses."<sup>234</sup> His second suggestion is based off restitution theory, which would require the "condemning authority to disgorge or at least share with the condemnee the . . . gains realized through the exercise of eminent domain."<sup>235</sup> As Professor Merrill averred, either of these strategies would not only lighten the burden on the condemnees, but it would likely cut down the arbitrary use of eminent domain by increasing the costs of condemning property.<sup>236</sup>

Additionally, as noted in the Task Force's study, condemnees are often not even provided with relocation costs.<sup>237</sup> The Task Force suggests that Missouri<sup>238</sup> should follow the lead of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 ("Act"), which mandates that where a project undertaken by a "displacing agency" will result in the displacement of any person, then "actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property" shall be provided to the condemnee.<sup>239</sup> Further, the Act states that if the condemnation involves a home where the condemnee actually lives, then an additional payment shall be made to the condemnee.<sup>240</sup> This payment, however, is not to exceed \$22,500, which in many cases, may be insufficient.<sup>241</sup>

Moreover, other factors, such as "heritage value" should be taken into consideration when making a landowner whole.<sup>242</sup> These factors could include the length of time a condemnee has owned the property, how long the property has been owned by the same family, relationships with sur-

233. See *The Kelo Decision: Investigating Takings of Homes and Other Private Property*, Hearing Before the Comm. on the Judiciary, 109th Cong. (2005), available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1612&wit\\_id=4661](http://judiciary.senate.gov/print_testimony.cfm?id=1612&wit_id=4661).

234. *Id.* at 116.

235. *Id.*

236. *Id.*

237. MO. EMINENT DOMAIN TASK FORCE, *supra* note 226, at 16.

238. A detailed summary of state compensation law is beyond the scope of this note, but this is a great idea for all states not currently providing relocation costs.

239. Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4622(a)(1) (2006).

240. *Id.* § 4623(a)(1).

241. *Id.* The statute authorizes a maximum of \$22,500.

242. MO. EMINENT DOMAIN TASK FORCE, *supra* note 226, at 16. The report states that some members of the Task Force were hesitant about this factor due to its inherent ambiguity, but suggested that it is capable of definition.

rounding neighbors, and general ties to the community.<sup>243</sup> Although these factors are abstract in nature and therefore difficult to quantify, they provide further justification for an enhanced value of property.

There are various methods of determining what “just” compensation would entail under circumstances similar to *Kelo*.<sup>244</sup> The realistic option would be to give the homeowner an enhanced market value of his property calculated by the anticipated value as a result of the taking.<sup>245</sup> Another, less optimistic idea would be to give the homeowner a certain percentage of profit-share in the private corporation.<sup>246</sup>

Under either option stated above, or any other option available, the primary purpose of the enhanced compensation would be to reasonably offset the gross disparity in economic benefit resulting from the taking.<sup>247</sup>

### CONCLUSION

People are obviously going to object to a condemnation of their home or property. It is human nature to believe that you are entitled to that which you own, and any attempt to persuade otherwise would be futile. In light of this intense resistance, there must be some type of benefit conferred upon the property owner who, essentially, loses everything in a typical condemnation proceeding.

The Fifth Amendment to the Constitution, applied to the states via the Fourteenth Amendment, provides that any taking must be accompanied by “just compensation.” The Framers used “just,” a term that is utterly indefinable in and of itself, to provide flexibility for circumstances that will inevitably vary from taking to taking. If the Framers’ intent was to create a set measure for compensation, they could have specified so in the Fifth Amendment or simply left “just” out of it altogether. Therefore, there is clearly a reason for the insertion of “just.”

243. See Brief of the American Planning Association, *supra* note 30, at 27; *cf. Kelo v. City of New London*, 545 U.S. 469, 475. Petitioner Wilhelmina Dery was born in her house in 1918 and has lived there ever since.

244. *Kelo*, 545 U.S. at 473–77 (involving circumstances where a private homeowner was unwilling to sell property for an economic development project, requiring the use of eminent domain and transfer of property to a private corporation).

245. In *Commodities*, the Court specifically rejected this idea, but the underlying facts of the case are distinguishable enough to warrant an ideological shift. *United States v. Commodities Trading Corp.*, 339 U.S. 121, 130–31 (1950).

246. Determining this share would, admittedly, be incredibly difficult.

247. More research is necessary to determine the realities of these proposed options. However, any one of these options would surely change the way in which the American public feels about the Takings Clause, and, more importantly, the enhanced compensation would allow people to understand that eminent domain for economic purpose is not necessarily a bad thing.



In a post-*Kelo* era, any challenges to the proposed “public purpose” of a condemnation will ultimately fail. Given that, it is the duty of state legislators, or perhaps if litigated, the duty of the Court, to determine that under circumstances similar to those seen in *Kelo*, a higher level of compensation is warranted to satisfy the requirement set forth in the Constitution. Federal legislation that seeks to effectively eliminate the exercise of eminent domain for economic takings is not the solution.<sup>248</sup> If this legislation is to succeed, the socioeconomic benefits that result from economic takings will be sacrificed, and the states will have little power to actively improve a distressed community. Additionally, job opportunities that are created from such exercises of eminent domain will also be destroyed. Supporters of the federal legislation<sup>249</sup> seem to overlook these beneficial characteristics of economic takings and, in the process, lobby for the elimination of an effective state means of preservation and improvement. Therefore, these supporters should redirect their efforts towards balancing out the process, which necessarily involves reforming how states treat the issue of just compensation.

Individual property owners have never had rights that supersede those of the general public, and this principle is exemplified by the holding in *Kelo*.<sup>250</sup> Can a person convincingly declare that he is entitled to the use and enjoyment of his property at the expense of others?<sup>251</sup> Should potential job opportunities for the unemployed be sacrificed because an individual property owner prefers to dine in his home, as opposed to somewhere else? Should tax benefits to an entire town, resulting in a variety of improvements for all its citizens, be extinguished because a single property owner desires to sit in his rocking chair on his porch? All of these questions must be answered in the negative.

The inquiry remains, however, how should these private property owners, who are forced to sacrifice their own use and enjoyment of their property for the common good, be compensated? Fair market value cannot be considered “just” under circumstances where the taking is justified for economic purposes. If the entire community, as well as a private corporation, is benefiting from the condemnation, then why should the victims of eminent domain not benefit as well? Even economists would agree that fair

248. See H.R. 4128, 109th Cong. (2005).

249. *Id.*

250. As well as the holdings in *Berman v. Parker* and *Hawaii Housing Authority v. Midkiff*.

251. The common law of nuisance was developed to remedy situations where an individual's use of property had an adverse effect on surrounding property owners' use and enjoyment. RESTATEMENT (SECOND) OF TORTS § 822 (1979).

market value does little to balance out the losses with the gains.<sup>252</sup> Therefore, a greater amount of compensation is necessary in order to make the purported protections of the Constitution a reality. Moreover, reforming the way in which compensation is determined is vital to restoring public faith in the government, and it is necessary for the future success of eminent domain.

252. See SAMUEL R. STALEY & JOHN P. BLAIR, *EMINENT DOMAIN, PRIVATE PROPERTY, AND REDEVELOPMENT: AN ECONOMIC ANALYSIS* (2005).

